

1986

# General Motors Acceptance Corporation, a New York Corporation v. Hector Martinez and Manuel M. Rivera : Brief of Respondent

Utah Supreme Court

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STATE OF UTAH

KET NO. 860365-CA

--VS--

--VS--

Third-Party Defendants-  
Respondents.

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Supreme Court No. 860429

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Category 13

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Appeal from Judgment of the District Court of Salt Lake County  
State of Utah, Honorable Dean E. Conder, Judge

\* \* \* \* \*

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IN THE SUPREME COURT OF THE

STATE OF UTAH

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GENERAL MOTORS ACCEPTANCE  
CORPORATION, a New York  
Corporation,

Plaintiff-Respondent,

vs.

HECTOR MARTINEZ and MANUEL M.  
RIVERA,

Defendants-Appellants,

vs.

GREAT EQUITY LIFE INSURANCE  
COMPANY OF CHICAGO, ILLINOIS;  
STREATOR CHEVROLET COMPANY,  
INC.; AL BARRUTIA; BRENT H.  
JENSEN; and E.C. ROSEBOROUGH,

Third-Party Defendants-  
Respondents.

Case No. 860429

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BRIEF OF PLAINTIFF-RESPONDENT  
GENERAL MOTORS ACCEPTANCE CORPORATION

---

NATURE OF THE CASE

Plaintiff, General Motors Acceptance Corporation, following decision and remand of Case No. 18072, by the Supreme Court, sought and obtained an amended judgment to allow plaintiff additional attorney's fees. Defendants-Appellants dispute the judgment entered by the lower court, as well as the amended judgment.

#### DISPOSITION IN LOWER COURT

After notice and hearing, the lower court granted plaintiff's request for additional attorney's fees and entered an amended judgment.

#### RELIEF SOUGHT ON APPEAL

Respondent, GMAC, seeks an affirmation of the amended judgment and of the award of attorney's fees.

#### STATEMENT OF FACTS

This matter comes before the Court a second time for review. A decision was rendered by the above-entitled Court, the Honorable Justice Dan I. Stewart writing the majority opinion in Case No. 18072, filed May 24, 1983.

Initially the case arose as an attempt by General Motors Acceptance Corporation to recover an automobile financed to Hector Martinez and Manuel M. Rivera. Subsequent to the filing of action by General Motors Acceptance Corporation to recover its collateral after default in payment, defendants-appellants joined Great Equity Life Insurance Company alleging responsibility in that insurance company to pay the obligation based on a disability claim of defendant Hector Martinez. At the conclusion of all evidence, the Court directed a verdict in favor of General Motors Acceptance Corporation. R-188. However, the Court did not enter judgment pending the outcome of a decision to be rendered by the Court following the submission of a special verdict by the jury. See transcript of trial at page 525.

After submission of arguments by counsel for defendants and Great Equity Life, following the special verdict, the Court, on September 23, 1981, entered a judgment of no cause of action in favor of Great Equity Life and against defendants Hector Martinez and Manuel Rivera. On appeal in Case No. 18072, this Court reversed the judgment of the trial court and remanded the case for entry of judgment against Great Equity and in favor of Hector Martinez and Manuel Rivera.

To put the issues in proper perspective, counsel has compiled a review of circumstances arising after the trial.

Following the entry of the judgment in favor of Great Equity and against defendant-appellants, on September 23, 1981, counsel for General Motors Acceptance Corporation (GMAC) filed a Motion for Entry of Judgment and scheduled the same for hearing on October 19, 1981. R-322. While the Motion for Entry of Judgment was pending and before the same was heard by the Court, counsel for appellants filed their Notice of Appeal on October 19, 1981. R-326. The Notice of Appeal raised the question of the judgment entered by Judge Conder on his Judgment and Order of September 23rd and the case in its entirety. R-327.

For reasons not indicated in the record, but likely because of the unavailability of the judge on October 19, 1981, plaintiff's Motion for Entry of Judgment and for determination of attorney's fees was not heard. Counsel for plaintiff then filed the motion again on November 17, 1981, scheduling a hearing for

November 23, 1981. R-336-337. This hearing scheduled for November 23rd was subsequently continued to December 2, 1981 on the request of counsel for appellants, Mr. Mark Miner. R-338. At the same time of the notice of continuance an affidavit respecting attorney's fees was also filed. R-340. Mr. Miner filed a written response contesting the right of counsel to the fees, but did not challenge the amount claimed. See R-342-346.

On December 2, 1981, the Motion for Entry of Judgment in favor of plaintiff was heard, but neither counsel for defendants nor Great Equity appeared. See recitation in Order at R-540. At the hearing on December 2, 1981, counsel submitted Findings of Fact and Conclusions of Law to the Court, which were executed on that date, although not filed until February 5, 1982. However, copies of said Findings of Fact and Conclusions of Law were mailed to counsel for defendants and Great Equity on December 2, 1981. R-538.

Also, on December 3, 1981, counsel sent a copy of the Order granting judgment (R-541), together with a memo of costs and a copy of the judgment by The Runner Service to respective counsel. R-539, 541 and 543. The originals thereof would have been sent to the Court.

The Judgment and Order respecting the above action as it occurred on December 2, 1981, was not signed by Judge Conder, likely due to an oversight, until February 5, 1982. At this time, the judgment was entered by Judge Conder and signed "Nuc



Pro Tunc". By way of explanation, counsel became aware that the particular documents sought in his designation of record filed with the Court on December 8, 1981 (R-534), had not been filed with the Court at the time counsel obtained the record for purposes of preparing his brief in the first appeal. Thereafter, counsel contacted the Court to find that the documents were still on the Judge's desk. Whereupon, Judge Conder, in the presence of counsel, signed the same as December 4, 1981, but indicated "Nuc Pro Tunc" and designated his date of signature as 2/5/82.

In the original action before the Court, counsel for appellants argued the matter concerning the alleged liability of Great Equity to appellants, but also raised in his brief and argument before the Supreme Court, defendants' challenge to plaintiff's claim for attorney's fees. The decision of the Supreme Court did not speak on this issue. R-536-538.

In its decision and by the remittitur submitted to the District Court, the Supreme Court determined "...the judgment of the trial court is reversed and the case remanded for entry of judgment against Great Equity and in favor of Hector Martinez and Manuel M. Rivera." R-534, 538. Rehearing was denied July 28, 1983 (R-535) and the file was returned to the Salt Lake County Clerk's Office on August 5, 1983. R-534.

On August 8, 1983, defendants' counsel filed his memo of costs (R-540) and on August 11th the third party defendant filed a Motion for Clarification of Judgment and scheduled a hearing

for August 19, 1983. R-544. On August 15, 1983, counsel for plaintiff filed an affidavit for additional attorney's fees (R-547), and further, petitioned the District Court to modify the judgment previously entered to allow added attorney's fees for time and expense incurred by plaintiff's counsel on appeal. R-549. Counsel for plaintiff scheduled the date of hearing as August 19, 1983, to correspond to the date of the previous notice indicated by counsel for Great Equity. R-549-550. On August 22, 1983, defendants' counsel filed his own motion to modify judgment and set a hearing for September 22nd. R-551, 553. On August 22nd, counsel for Great Equity also continued his previously filed motion to September 22nd. R-555-556.

On August 25th plaintiff's counsel then filed a Notice of Continuance of its motion to modify judgment and for attorney's fees from August 19, 1983 to September 1st. This change was necessitated in that the Court did not schedule hearings for the 19th as previously scheduled by counsel. See R-557. A copy of this Notice of Continuance to September 1st was forwarded to counsel for defendants on August 25, 1983. R-558. According to the Minute Entry of the Court (R-559), no one appeared for defendants and the Court granted plaintiff's motion to amend judgment. Plaintiff's order and judgment form were sent to counsel on September 6, 1983 (R-581), but the same were not signed by Judge Conder until after hearing was held thereon with respect to defendant's motion to strike the Order and Judgment filed

September 12, 1983. R-560. Counsel for appellants further filed an affidavit requesting \$3500 in attorney's fees (R-563), and asserted his efforts were worth \$3500. R-569.

Hearing was held before Judge Conder on all issues relating to the matters raised since the original appeal decision and, although respective counsel for plaintiff and defendant each submitted his respective Order of the proceedings (R-590 and R-587 respectively), the Court entered a Minute Entry at R-579 indicating as follows:

After argument of counsel and a review of the memorandums and Supreme Court Opinion in the above case, this Court finds that the plaintiff's judgment against defendants Martinez and Rivera still stands. The Supreme Court only considered and reversed the issue on insurance coverage between the defendants and Great Equity Life Insurance. Since the motion for additional attorney's fees was presented by a motion before this Court on September 1, 1983, and defendants' counsel failed to appear at said hearing, this Court will stand on its ruling at that time and grant the additional attorney's fee.

On October 13, 1983, defendants' counsel appealed this decision to the Court.

#### ARGUMENT

##### POINT I.

THE PRIOR DECISION OF THE UTAH SUPREME COURT IN CASE NO. 18072, (A) DID NOT REVERSE THE JUDGMENT ENTERED BY THE LOWER COURT IN FAVOR OF PLAINTIFF AND AGAINST DEFENDANTS MARTINEZ AND RIVERA, AND (B) THE SUPREME COURT WAS WITHOUT JURISDICTION TO REVERSE THE SAME.

During trial of the instant action and following trial, the Honorable Dean E. Conder, entered two judgments. One was in favor of plaintiff under its contract. See Minute Entry R-188 and Judgment R-539. The other judgment of no cause of action in favor of the third-party defendant Great Equity Life and against defendants was entered subsequent to the jury decision on September 23, 1981. R-291. In its previous opinion, in Case No. 18072, this Court indicated, "The judgment of the trial court is reversed and the case remanded for entry of judgment against Great Equity and in favor of Hector Martinez and Manuel M. Rivera." R-538. At issue is whether the Court intended to reverse the directed verdict and judgment of the lower court entered in favor of the plaintiff and whether this Court had jurisdiction in any event. Counsel submits that such decision did not, or if the Court so intended, that it was without jurisdiction to do so.

A. First, in its decision, the Court at the outset of its opinion recognized that the trial court had entered judgment in favor of GMAC and against Martinez and Rivera and against Martinez and Rivera on their third-party complaint against Great Equity. However, the Court went on to say:

The only issue on this appeal is whether a pre-existing illness clause in the insurance policy excluded Hector Martinez from coverage under the policy. R-536.

The opinion of the Court then speaks directly to this issue and does not mention any consequence with respect to the judgment entered in favor of plaintiff. The Court further, in its remittitur and opinion, indicated the judgment of the trial court would

be reversed and the case was to be remanded for entry of judgment against Great Equity and in favor of Hector Martinez and Manuel M. Rivera. Further, on review of the decision by Judge Conder, he also found after a review of the Supreme Court opinion "... that the plaintiff's judgment against defendants Martinez and Rivera still stands." R-579. Counsel would submit that the Court never intended to reverse the judgment granted by Judge Conder as decreed at the trial of the case (R-188), and as entered in the "Nuc Pro Tunc" judgment of December 4, 1981. R-539.

B. Secondly, counsel asserts that the Supreme Court, in the prior proceeding, was without jurisdiction to reverse the decision of Judge Conder, as that judgment was not properly before the Court.

At trial, Judge Conder granted a directed verdict on behalf of plaintiff, but indicated that he would stay enforcement of the judgment pending the final outcome by the jury. See trial transcript at page 525. Although the jury returned a verdict, there was some dispute between counsel for defendants and Great Equity Life as to the meaning thereof. This dispute was thereafter briefed by the parties and decision made on September 23, 1981. However, at the time the Court entered judgment in favor of Great Equity Life and against defendants, the judgment with respect to plaintiff's claim had not been finalized. Counsel for GMAC filed for a determination of the judgment on October 9th and scheduled the same for hearing on October 19, 1981. Although the motion

was not heard on that particular date, counsel for defendants nevertheless filed his Notice of Appeal on October 19, 1981.

R-326.

Utah Rules of Procedure 54(b) provides:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, or third-party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Under Rule 54(b), if there are matters which are unresolved, then any order that may have been entered is still subject to revision by the court before entry of judgment adjudicating all the claims. The appeal taken by defendants in the initial case (18072) was taken before a final adjudication was made between the rights of plaintiff and defendants. At the time of entry of the judgment relative to Great Equity and defendant on September 23rd, the Court failed to make "...an express determination ... that there is no just reason for delay ... for an entry of judgment." As a consequence, the appeal by Mr. Miner was premature and could not divest the District Court of jurisdiction to conclude the matter relating to plaintiff. Although Judge Conder had ruled orally from the bench that judgment should be rendered

in favor of plaintiff (Transcript 525), his indication of a stay would not create a final judgment except after entry of Findings of Fact and Conclusions of Law and formal Judgment. See Hinkins v. Santi, 25 Utah 2d 324, 481 P.2d 53 (1971).

Counsel for plaintiff is not unmindful of the fact that he did file a brief in an effort to respond to proceedings attempted to be raised against plaintiff in Case No. 18072. However, this filing of a brief and argument by counsel would still not confer jurisdiction upon the Court to proceed. Then jurisdiction cannot be conferred on the Supreme Court by consent, stipulation or waiver. See Dixie Stock Growers Bank v. Washington County, 81 Utah 429, 19 P.2d 388 (1933).

As a consequence of the premature appeal effort by defendants, the judgment entered by Judge Conder in favor of plaintiff and against defendants on December 4, 1981, finally adjudicated all of the issues before the Court. Counsel failed to take an appeal from that action. Therefore, the judgment should stand.

#### POINT II.

PLAINTIFF SHOULD BE GRANTED ADDITIONAL ATTORNEY'S FEES FOR TIME AND EFFORT SPENT ON APPEAL.

Counsel for defendants seeks here to reargue the question raised before the Court in a previous proceeding as to whether attorney's fees were properly awarded by Judge Conder in the previous proceeding. Counsel submits that inasmuch as the matter

was previously raised on appeal and no disposition thereof made, that reargument hereof is improper. However, if the Court determines that such should be considered by this appeal, then, in the interest of time and space, counsel has reproduced his response to that position in his brief previously submitted in Case No. 18072. This is affixed as part of this brief as Appendix "A".

Based on counsel's argument in Point I of this brief, it is counsel's position that the judgment entered by Dean E. Conder either was not reversed by the Court, or that the Court was without jurisdiction to reverse the same in any event. However, at issue before the Court is the question of whether it would be proper for the District Court to have amended the Judgment to allow additional attorney's fees for efforts spent by plaintiff's counsel on the prior appeal.

Although there is some authority to the contrary [Yamanishi v. Bleely and Coleshaw Inc., 105 Cal. Rep. 580, 29 Cal. App. 3rd. 457 (1972); Vailes v. Marine Bosin Company, 224 NYS 2d 852 (1962)] it has been recognized that a District Court has inherent authority in a proper case, if acting in a reasonable period of time to amend its judgment to allow for an award of attorney's fees. See Lowell v. Institutional Investors Trust, 529 P.2d 920 (Ore. 1974) and Bratt v. Andrews, 514 P.2d 540 (Ore. 1973). In Bratt v. Andrews, supra, the trial court after entering a judgment, later granted a modification of the judgment to allow an award for attorney's fees. On appeal, appellant argued that su



procedure was improper. In upholding the trial court the Oregon Supreme Court indicated that a trial judge has inherent power to modify its judgment if done within a reasonable time. And then at page 541, indicated: "... we see no reason why attorney's fees should not be the subject of an order modifying a judgment where justice so requires."

In Lowell v. Institutional Investors Trust, supra, the Oregon Supreme Court again speaking on a like issue indicated:

We do not disagree with IIT's contention that the trial court has the inherent authority in a proper case and within a reasonable time to amend its judgment as to the amount of an award of attorney's fees.

In the instant case, counsel for plaintiff in the protection of his client's interest was required to expend added time and effort beyond the trial. After remand of the first appeal on August 5th, counsel, within 10 days thereafter, filed request to modify the judgment to allow for these fees. Counsel would submit that the position of the Oregon Court should be favored to allow amendments to judgments to add on additional costs and attorney's fees following appeal. This allowance precludes the necessity of independent suits to establish the right in a claim of a party once the same has already been established and the matter remaining relates only to the value thereof.

Counsel would submit that the better position is that asserted by the Courts of Oregon, and although counsel recognizes the cases are not directly on point, the rule of flexibility to allow additional attorney's fees when petition thereof is made

within a reasonable time, should be adopted. The entry of judgment for attorney's fees by Judge Conder in the court below was for services rendered by counsel up to the date of the proceeding before the Court. See R-340 and 539. Additional time and effort had to spent by plaintiff's counsel in protecting the interest of its client by the first appeal taken by defendants. Counsel also petitioned the court below within 10 days after the case was remanded to the District Court for the additional attorney's fees. R-534 and 549. Timewise this would be reasonable. To rule that the entry of judgment foreclosed any modification thereafter would compel either a loss to the plaintiff for services necessarily rendered in protecting his client's interests after the date of judgment as a consequence of defendant's appeal, or bring about a separate action to establish the additional fees.

Inasmuch as the judge sitting in the case would be in a better position to determine the reasonable value of the fees with respect to the case and opportunity for hearing thereon had been given to counsel for defendants, the decision of Judge Conder granting additional attorney's fees should be upheld.

#### POINT III.

THE ENTRY OF THE JUDGMENT BY THE HONORABLE DEAN E. CONDER OF NUC PRO TUNC WAS VALID.

Counsel for defendants and appellants suggests that the judgment entered by Judge Conder as "nuc pro tunc" for December 4, 1981, but actually signed on February 5, 1982, is void. A

judgment "nuc pro tunc" is recognized in law and the same is not void although it may not enlarge the rights of a party (see Kettner v. Snow, 13 Utah 2d 382, 370 P.2d 28 (1962), nor may it be used to restrict the rights of a party. See Utah State Building Board v. Walsh Plumbing Company, 16 Utah 2d 249, 399 P.2d 141 (1965).

Entry of an order or judgment "nuc pro tunc" is recognized as an act upon one date to make it effective as of a prior date. Its purpose is to allow omissions to be supplied so a record will reflect what actually took place in a given circumstance. See Kettner v. Snow, supra. However, it may not be used as a device to revive time for taking a required step in a legal proceeding after the time period allowed has elapsed. See Kettner v. Snow, supra, indicating time for motion for new trial may not be altered "nuc pro tunc" after the 10 day period has expired. Also, it has been recognized that entry of a judgment "nuc pro tunc" may not be used to reduce a prescribed time period, nor to defeat the right to take an appeal. Utah State Building Board v. Walsh Plumbing Company, supra.

In the Walsh Plumbing Company case, where a judgment had been entered on April 2, 1964 and appellant brought his appeal on April 30, 1964, the court held that the signing of an order of judgment nuc pro tunc as of February 24, 1964, at the time a pre-trial order was signed, could not bar the right of the appellant to file his appeal within one month after the April 2, 1964 date.

In the instant case, the entry of the judgment by Judge Conder of "nuc pro tunc" was entered back to reflect a period at or near the date that Findings of Fact and Conclusions of Law were signed and the matter in issue was argued before the Court. However, counsel's appeal opportunity would have run from the 5th day of February, 1982 and not from December 4, 1981. See Utah State Building Board v. Walsh Plumbing Company, supra.

Counsel for appellants seems to suggest that the judgment entered by Judge Conder was void because it impaired his appeal rights. However, counsel has never taken any steps to appeal the judgment rendered by the Honorable Dean E. Conder on February 5, 1982, except as he attempted to appeal the entire decision on October 19, 1981, before judgment had been entered for plaintiff. R-324; 539. As previously discussed in POINT I-B, this he could not do. See Rule 54(b) and Hinkins v. Santi, supra and Dixie State Growers Bank v. Washington County, supra.

#### CONCLUSION

For the reasons as set forth in plaintiff's brief, the amended judgment of the lower court in favor of plaintiff and against defendants should be upheld and further, the attorney's fees as established to the satisfaction of the trial court should be awarded.

Respectfully submitted.

---

Jay V. Barney

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Brief of Plaintiff-Respondent was mailed, postage prepaid, to:

Mark S. Miner, Esq.  
525 Newhouse Building  
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(Attorney for Defendants-Appellants  
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William J. Hansen, Esq.  
900 Kearns Building  
Salt Lake City, Utah 84101  
(Attorney for Third-Party Defendant-Respondent  
Great Equity Life Insurance Company)

on this 12th day of December, 1986.

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Jay V. Barney

## APPENDIX "A"

### POINT II

WHETHER A PARTY TO A CONTRACT AUTHORIZING RECOVERY OF ATTORNEYS FEES WAIVES THE RIGHT TO OBTAIN SUCH FEES BY FAILING TO PRESENT EVIDENCE THEREOF BEFORE THE JURY BUT THEREAFTER PRESENTS EVIDENCE TO THE COURT.

Under our law, attorneys fees are awardable only if expressly provided by contract or statute and then only if there is produced to the Court evidence of the necessity and reasonableness of the fee awarded. Walker v. Sandwick, 548 P.2d 1273 (Utah 1976). There is no question that the sales contract in issue did provide for attorneys fees if an attorney was utilized to enforce collection of the contract. See Plaintiff's Exhibit "1", reverse side, Paragraph 4.

The establishment of a reasonable attorneys fee in a contested matter is not controlled by any set formula [Wallace v. Build, Inc., 16 Utah 2d 401, 402 P.2d 699 (1965)] and the same may be established by stipulation, an un rebutted affidavit or evidence given as to the value thereof. Freed Finance Company v. Stoker Motor Company, 537 P.2d 1039 (Utah 1975). Regardless of how the fee is proved, it is clear that the fee must be supported by evidence in the record. See Richards v. Hodson, 26 Utah 2d 113, 485 P.2d 1044 (1971).

Counsel for Defendants suggests two propositions as to why attorneys fees should not be granted: first, he indicates there is no evidence in the record, and second, that no evidence was presented to the jury.

As to the first proposition, the record evidences that after the Court directed a verdict in favor of Plaintiff, Counsel sought for a hearing to establish his claim for attorneys fees and for entry of judgment based upon the of Court's granting of Plaintiff's motion for directed verdict at trial. (R. 336). The motion was initially scheduled for November 23, 1981, and was rescheduled to be heard on December 2, 1981, at the request of Counsel for Defendants (R. 338) who, after receiving notice of the hearing and a copy of Counsel's Affidavit for attorneys fees, neither attended the hearing nor opposed the reasonableness of the fees in the Affidavit. (R. 540). Counsel did forward his motion requesting a denial of the attorneys fees because of failure to produce evidence before the jury but did not challenge the reasonableness of the fees. (R. 342). Consequently, the Court properly awarded attorneys fees after the trial based on proper evidence, and an un rebutted affidavit. (R. 536-538; R. 539); See Freed Finance Company v. Stoker Motor Company, supra.

The second question raised is whether failure of Counsel to provide testimony before the jury for its consideration precludes the subsequent entry of the award. It is true that attorneys fees must be proved as other damages, that is, by stipulation or evidence, [Cluff v. Culmer, 556 P.2d 498 (Utah 1976)] but the question is, to whom must the reasonableness of the fee be proved? This Court has long held that the judiciary has the power to determine what is a reasonable attorneys fee when a claim therefor is properly in issue by contract or by statute. Thatcher v. Industrial Commission, 115 Utah 568, 207

P.2d 178 (1949). Further, as stated in Wallace v. Build, Inc., 402 P.2d 699, 701, (1965):

What is reasonable depends upon a number of factors, the amount in controversy, the extent of services rendered and other factors which the trial court is in an advantaged position to judge. Emphasis added.

In F.M.A. Financial Corporation v. Build, Inc., 17 Utah 2d 80, 404 P.2d 670 (1965), the Court recognized that an award of attorneys fees need be supported by some evidence to the judge, stating at page 673 of 404 P.2d:

Because both judges and lawyers have special knowledge as to the value of legal services, this (proof of fees) is not always required to be proved by sworn testimony. It is sometimes submitted upon stipulation as to the amount; or that the judge may fix it on the basis of his own knowledge and experience; and/or in connection with reference to a bar approved schedule. Emphasis added; matter in parenthesis and underlining by author.

From the authorities cited, it is evident that the reasonableness of an attorneys fee is a matter for court determination. The reasonableness of this position affords the trial judge, himself an experienced lawyer, the opportunity of determining what is reasonable in a given case. Laymen jurors unfamiliar with the demands and efforts of counsel, would not be in a position to identify what is reasonable in a given case. Producing such evidence would be a waste of the jurors' time. Further, if evidence concerning reasonableness of attorneys fees is produced before the jury, this puts counsel in the awkward situation not only of having to argue the cause of his client's merits but to justify before the jury his charges for his services, thus requiring counsel to, "have a fool for a client."

A reading of the case of Gardner v. Christiansen, 622 P.2d 782 (Utah 1980), might cause one to conclude that an award of attorneys fees must be based upon evidence produced in the case.



in chief and not after. Here, Counsel, after resting his case and prior to closing argument, moved to reopen, in a hearing before the judge, to produce evidence of attorneys fees, which was denied by the Court. On appeal, the Court although recognizing that a motion to reopen for additional evidence is within the sound discretion of the Court, nevertheless ruled the trial Court abused its discretion in failing to allow counsel to present the requested evidence. The case does not stand for the position that evidence of attorney's fees must be made prior to resting one's case. In fact, in Provo City Corp. v. Cropper, 28 Utah 2d 1, 497 P.2d 629 (1972), the Supreme Court remanded the case to the District Court for the purpose of taking evidence on the issue of attorney's fees, when such evidence was omitted at trial.

Even assuming that the jury was the proper forum to have heard the evidence relative to attorneys fees, failure of counsel to present evidence to the jury would not be fatal to the award rendered by the Court in the instant case. Then, the Court directed a verdict for Plaintiff at the close of all the evidence, the Court took all issues relating to Plaintiff's case from the jury. Therefore, it also had the discretion to receive such further evidence in the case as it deemed pertinent. See Gardner v. Christiansen, supra.

In the exercise of its discretion, the lower Court granted Counsel for Plaintiff, after notice to Defendants' Counsel, an

opportunity to present its claim for attorneys fees and accepted the affidavit as presented. Such discretion in proceeding was not prejudicial to the rights of Defendant (See Gardner v. Christiansen, supra at 784), especially where the affidavit of Plaintiff's Counsel as to the reasonableness of the fees was unopposed. See Freed Finance Company v. Stoker Motor Company, supra.

For the reasons above stated, the judgment of the lower Court awarding attorneys' fees should be upheld.